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IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 84-5442, 84-5467, 84-5468 and 84-5470

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,

v.

BROTHERHOOD of RAILWAY and AIRLINE CLERKS, *et al.*,
Appellants.

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,
ASSOCIATION OF FLIGHT ATTENDANTS,
Appellant.

ALASKA AIRLINES, INC., *et al.*,

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Appellant.

ALASKA AIRLINES, INC., *et al.*

v.

RAYMOND J. DONOVAN, individually and as Secretary of Labor, *et al.*,

Appellants,

AIR LINE PILOTS ASSOCIATION, *et al.*

Argued March 28, 1985

Decided July 16, 1985

Before TAMM, GINSBURG and STARR, Circuit Judges.

Opinion for the Court filed by Circuit Judge STARR.

Statement concurring in the judgment filed by Circuit Judge GINSBURG.

STARR, Circuit Judge.

This case raises a question left in the wake of *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), invalidating as violative of separation of powers principles the device of the legislative veto of administrative regulations. The context is Congress' pre-*Chadha* deregulation of the airline industry. The specific issue is whether an unconstitutional legislative veto provision contained in section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), is severable from the remainder of the airline employee protection provisions of that statute. We conclude that the veto provision should be severed; we therefore reverse the judgment of the District Court, 594 F. Supp. 92, which held the veto provision inseverable. Inasmuch as the District

Court did not have occasion to address the other issues raised by the airlines, we remand the case for further consideration.

I

The Airline Deregulation Act of 1978 contains an employee protection program for the benefit of employees displaced through the impact of deregulation on the shifting fortunes of individual air carriers. *See id.* § 43 at 92 Stat. 1750, *codified at* 49 U.S.C. app. § 1552 (1982). As originally crafted, the program contained two prongs. The first provided monetary support and assistance in relocation to individuals who had lost their employment or suffered a diminution in compensation as a result of a qualifying industry dislocation. *See* 49 U.S.C. app. § 1552(a)-(c). While that provision is still on the books, Congress has never funded its implementation; inasmuch as that provision's operation was expressly made subject to Congress' appropriation of funds for financial assistance, *see* 49 U.S.C. app. § 1552(a), this portion of the employee protection program is inoperative and, accordingly, no implementing regulations have been promulgated under it.

The employee protection program's second prong triggered the litigation now before us. That portion consists of a "first hire" requirement. That is to say, a person who had been employed for at least four years prior to October 24, 1978 (the effective date of the Act) by an air carrier holding a certificate under the pre-deregulation regime and who was furloughed or terminated (other than for cause) prior to the Act's effective date had a first right of hire by other pre-deregulation certificated air carriers. *See* 49 U.S.C. app. § 1552(d), (h)(1). This right of first hire was without regard to age but applied only to airlines hiring within the individual's occupational specialty; moreover, airlines could lawfully recall their own furloughed employees before hiring those displaced from other carriers. *See* 49 U.S.C. app. § 1552(d).

The Secretary of Labor was granted authority to issue, amend and repeal rules and regulations necessary to administer the employee protection plan. *See* 49 U.S.C. app. § 1552(f)(1), (h)(3). However, that authority was limited by the following provisions:

> The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both House stating that the Congress approves of them.

49 U.S.C. app. § 1552(f)(3). Exceptionally, this section combines the "report and wait" provision (found in the first sentence of the quoted language) with a one-House legislative veto[1] (set forth in the second sentence).

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[1] Justice White's dissent in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), summarizes the history of the implementation of the legislative veto. *See id.* at 968-74, 103 S.Ct. at 2793-96 (White, J., dissenting). He traces that history from its American genesis in the reorganization provisions of Pub.L. No. 72-212, 47 Stat. 382, 413-15 (1932), through its inclusion "in nearly 200 statutes . . . in every field of governmental concern: reorganization, budgets, foreign affairs, war powers, and regulation of trade, safety, energy, the environment and the economy." *Id.* at 968, 103 S.Ct. at 2793. Earlier use of the device, dating back to the Nineteenth Century, is found in English

Pursuant to his statutory authority, the Secretary of Labor published regulations for the administration of both prongs of the protection plan in March 1979. *See* 44 Fed. Reg. 19,146 (1979). A revision of the proposed regulations, covering only the first hire provisions, was published in September 1982. *See* 47 Fed. Reg. 41,304 (1982). Final regulations were published on November 22, 1983, *see* 48 Fed. Reg. 52,854 (1983), were duly transmitted to Congress, and were to become effective after sixty legislative days.

In February 1984, however, before the regulations became effective, Alaska Airlines, Inc. and various other airlines filed a complaint in United States District Court for the District of Columbia. They alleged that the first hire provisions of the Act were invalid because of the inclusion of an unconstitutional legislative veto in section 43(f)(3). In addition, they challenged the regulations themselves as violative of the Due Process Clause and, on nonconstitutional grounds, as arbitrary and capricious, an abuse of agency discretion and otherwise not in accordance with law. The Department of Labor conceded below, *see Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 94 (D.D.C. 1984), and does not contest here, that the legislative veto provision is unconstitutional under *Chadha*. The Government argued, however, that the invalid veto provision is severable from the remainder of the Act and that the remainder of the employee protection plan, and the rules and regulations adopted thereunder, are lawful and valid.

Plaintiffs-appellees moved for summary judgment, and the Department of Labor moved to dismiss or for an order affirming the validity of the regulations. On May 17, 1984, the day the regulations were to become effective, the

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administrative law. *See* Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO.WASH.L.REV. 351, 359 (1978).

District Court granted the airlines' motion, holding that section 43 was invalid in its entirety due to the inclusion of what the court deemed to be an inseverable legislative veto provision. The court's opinion issued the following day. Neither the order nor the opinion addressed the other issues raised in the airlines' complaint.

II

Before reaching the principal issue presented on this appeal, namely the severability of the legislative veto from the remainder of section 43 of the Airline Deregulation Act, several preliminary issues must be addressed.

A

The first question is whether we have jurisdiction over this appeal. The issue is raised only in a footnote in the Alaska Airlines Brief, *see* Appellees' Brief at 9 n.*, where appellees question, in passing, whether jurisdiction in fact lies in this court; because of the obvious importance of that question, the subject merits our analysis at the outset. A basic jurisdictional provision of Title 28 is that the Supreme Court, not the Courts of Appeals, is vested with jurisdiction over appeals from District Court decisions holding an Act of Congress unconstitutional in any civil action in which the United States, or an agency, official or employee thereof, is a party. 28 U.S.C. § 1252 (1982). In keeping with this provision, the several Courts of Appeals enjoy jurisdiction over appeals from final decisions of the district courts "*except* where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1982) (emphasis added). The airlines suggest that since the District Court held the entire section unconstitutional, exclusive review of that judgment should lie in the Supreme Court.

Those two Title 28 provisions might be read to support the airlines' position. In fact, the appeal in this action

was originally filed in the Supreme Court, but due to a recent Supreme Court decision was thereafter refiled in this court. *See* Appellant Secretary of Labor's Brief at 10 n. 5. To determine whether the shift in tribunals was proper and jurisdiction actually lies here we examine that recent Supreme Court disposition.

In *Equal Employment Opportunity Commission v. Allstate Insurance Co.*, —— U.S. ——, 104 S.Ct. 3499, 82 L.Ed.2d 810 (1984), the Court, by order, held that it had no jurisdiction in a legislative veto case. The obvious difficulty in analyzing the Supreme Court's decision in *Allstate* is that the dismissal for lack of jurisdiction was without opinion. There was, however, a dissent by the Chief Justice, joined by Justice O'Connor, which presents at least two Justices' view of the Court's reasoning. The district court in that case, 570 F. Supp. 1224 (S.D. Miss. 1983), had held the Reorganization Act of 1977, Pub. L. No. 95-17, 91 Stat. 29 (1977), unconstitutional because of the presence of a non-severable legislative veto provision. That statute contained the provision pursuant to which the Equal Employment Opportunity Commission had been authorized to enforce the Equal Pay Act, Pub. L. No. 88-38, 77 Stat. 56 (1963). After ruling that the Reorganization Act failed in its entirety, the court held that the EEOC lacked authority to enforce the Equal Pay Act and granted summary judgment in favor of Allstate.[2]

An appeal thereafter taken directly to the Supreme Court was summarily dismissed for want of jurisdiction. Appearing to find the Court's approach overbroad, the Chief Justice stated:

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[2] After the district court decision in *EEOC v. Allstate*, but before the Supreme Court's consideration, the Fifth Circuit held, in a separate case, that the legislative veto in the Reorganization Act was severable and that the EEOC did have authority to enforce the Equal Pay Act. *See Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984).

> Had the District Court simply determined, as a matter of statutory construction, that appellant cannot exercise the authority to enforce the Equal Pay Act because Congress did not wish the Act to be operative absent the veto provision, I would agree that dismissal would clearly be compelled under *Heckler v. Edwards* [—— U.S. ——, 104 S.Ct. 1532, 79 L.Ed.2d 878 (1984)]. Under these circumstances, it would be clear, as in *Heckler*, that appellant was not challenging the constitutional holding of the District Court since it concedes the validity of the court's holding on the legislative veto provision. But this is not the holding of the District Court. And the mere assertion now by the Solicitor General, and implicitly by the Court, that the holding was in reality one of statutory construction cannot change the fact that the District Court explicitly and unambiguously held the entire Act *unconstitutional.*

Allstate, supra, 104 S.Ct. at 3502 (emphasis in original).

Using this explanation as guidance to the Court's position on the jurisdictional issue, it appears that the appeal in the case at hand appropriately lies in this court. The District Court here did not break any new ground with respect to a constitutional issue. To the contrary, its decision that the legislative veto provision was unconstitutional was squarely rooted in *Chadha*, as evidenced by the fact that neither side contests that portion of the District Court's decision. Thus, the constitutional decision is, in truth, not a part of this appeal. What is at issue on appeal, rather, is the severability *vel non* of the remainder of the section in which the legislative veto appears. That question, as we shall see, reduces to a matter of statutory interpretation, *see generally* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 115 (1937). As even the *Allstate* dissenters opined, jurisdiction would not under those circumstances lie in the Supreme Court but would instead be vested in this

court. *See also Heckler v. Edwards*, *supra*, 104 S.Ct. at 1536 ("a party does not have a right to direct review in the Supreme Court under 28 U.S.C. § 1252 unless the holding of federal statutory unconstitutionality is in issue"). Accordingly, we are persuaded that the present appeal is properly before us.

B

The second preliminary issue is whether this dispute is ripe for review, inasmuch as Congress has not attempted to exercise the legislative-veto power purportedly conferred by the Airline Deregulation Act. In a case suggesting the possibility of a lack of ripeness, *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950, 97 S.Ct. 2667, 53 L.Ed.2d 267 (1977), this court in a pre-*Chadha* ruling stated that "[u]ntil Congress exercises the one-house veto, it may be difficult to present a case with sufficient concreteness as to standing and ripeness to justify judicial resolution of the pervasive constitutional issue which the one-house veto provision involves." *Id.* at 649. However, this court also stated, importantly for our purposes, that "[a] contention that there are no real considerations of ripeness here can only rest on a view of the merits that a one-house veto is so patently unconstitutional that nothing more is needed to inform the judgment of the court." *Id.* at 649 n. 8. This court, at that time, was unwilling to deem the legislative veto device patently unconstitutional; however, in *Chadha*'s wake, this sort of veto provision is manifestly unconstitutional, and thus under *Clark v. Valeo*'s teaching the issue before us may well be ripe for adjudication.

On the other hand, the proposition that the issue is not ripe finds its strongest support in a decision from another circuit, *Muller Optical Co. v. Equal Employment Opportunity Commission*, 743 F.2d 380 (6th Cir. 1984). In that case, the legislative veto provision of the Reorganization Act of 1977 was once again in issue. The Sixth Circuit

concluded that "the existence of a one-House veto provision in a statute does not render the statute invalid but only renders the act of Congress, if it attempts to exercise its one-House veto[,] invalid . . . ." *Id.* at 388. The Reorganization Plan No. 1 of 1978, which transferred authority to the EEOC to enforce the Age Discrimination in Employment Act, *see infra* note 5, had long since been reviewed by Congress, and Congress had chosen not to exercise its legislative veto. The court stated:

> To inquire at this point in time whether Congress would have passed the Reorganizational [sic] Act without the one-House veto provision and, thereby, whether the substantive provisions of the Act are effective absent the provision, makes no sense when Congress has already declined to use the veto provision and thus has already approved the plan.

Id.

In *Mu'ler*, the Reorganization Plan in question was promulgated, and Congress elected not to veto it, prior to *Chadha*. Congress thus tacitly approved the plan, thereby strengthening the argument that the constitutionality *vel non* of the unutilized veto provision should not have been adjudicated. Here, however, the Department of Labor promulgated its regulations after *Chadha* was handed down. At that point, Congress did not, in truth, enjoy the option of vetoing the rules; indeed, to have attempted to do so, in light of *Chadha*, would have been an exercise in futility. Hence, the Congressional approval found tacitly in *Muller* cannot, in reason, be read into the situation at hand. In the post-*Chadha* era in which Congress knows that it may not lawfully exercise the purported veto authority, to hold that a court cannot reach the issue of the constitutionality of such a device unless Congress has exercised the provision would be, in effect, to shield all agency action from review as to whether Congress would have provided the underlying authority without its veto oversight. This we decline to do.

C

The final preliminary question is whether *Chadha* should be applied retroactively. The test for retroactivity of a judicial decision is laid out in *Northern Pipeline Constructon Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), and *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). *Northern Pipeline* states that there are

> three considerations . . . properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, . . . second, "whether retrospective operation will further or retard [the] operation" of the holding in question, . . . and third, whether retroactive application "could produce substantial inequitable results" in individual cases . . . .

Northern Pipeline, supra, 458 U.S. at 88, 102 S.Ct. at 2880 (quoting *Chevron, supra*, 404 U.S. at 106-07, 92 S.Ct. at 355).

With regard to the first factor, the Association of Flight Attendants argues before us that *Chadha* erected a new principle of law that could not reasonably have been anticipated. In response, the airlines point to fifty years of political and scholarly debate and speculation as to the constitutionality of such provisions; over the years various commentators have questioned the constitutionality of the legislative veto device,[3] while others have rushed

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[3] *See, e.g.*, Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV.L.REV. 569 (1953); Dixon, *The Congressional Veto and Separation of Powers: The Executives on a Leash*, 56 N.C.L.REV. 423 (1978); Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA.L.REV. 253 (1982). For a more complete compilation, see *Chadha, supra*, 462 U.S. at 976 n. 12, 103 S.Ct. at 2797 n. 12 (White, J., dissenting).

to its defense.[4] Furthermore, this court in *Consumer Energy Council of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 77 L.Ed.2d 1403, 77 L.Ed.2d 1413 (1983), held prior to *Chadha* that the legislative veto provision of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978), was unconstitutional. In view of all this, at the very least, some considerable doubt had been raised prior to *Chadha* with respect to the constitutionality of legislative veto provisions.

The second factor, the furtherance or retarding of the decision's operation, speaks more strongly in favor of *Chadha*'s retroactive application. That decision, of course, pertained to a bedrock issue of the structure of the National Government, namely the separation of powers enshrined by the Framers in Philadelphia in the summer of 1787. The fundamental concern over fidelity to that principle of governance of a free people would scarcely be furthered by shielding from challenge a separation-of-powers violation simply by virtue of the fact that the unconstitutional provision was passed prior to *Chadha*. While it may be argued that regulations promulgated and not vetoed (or even promulgated but vetoed) prior to *Chadha* should not be subjected to retroactive application, it seems strained to argue that the provision itself should be protected from *Chadha*'s retroactive application. The veto device works a potential violation of separation of powers principles; that provision indisputably ripens into a very real violation when regulations are purportedly vetoed.

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[4] *See, e.g.*, Newman & Keaton, *Congress and the Faithful Execution of Laws—Should Legislators Supervise Administrators?*, 41 CALIF.L.REV. 565 (1953); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO.WASH.L.REV. 467 (1962). For a more complete compilation, see *Chadha, supra*, 462 U.S. at 976 n. 12, 103 S.Ct. at 2797 n. 12 (White, J., dissenting).

An alternative problem arises in this post-*Chadha* day and age in which Congress is plainly forbidden from exercising a veto. If we refuse to apply *Chadha* to the post-*Chadha* adoption of regulations under a pre-*Chadha* statute that includes a legislative veto, the Executive branch might thereby be permitted to exercise power that Congress would not have delegated had it not retained some power of review through the legislative veto device. In short, while the second factor might shield from retroactive application those regulations fully in place prior to *Chadha*, that factor should not shield the legislative veto provisions themselves from constitutional scrutiny.

The third factor, substantial inequitable results from retroactive application, weighs heavily on neither side. The Association of Flight Attendants argues that great inequity would result from *Chadha*'s retroactive application in that employees would no longer enjoy the protective mechanisms carefully crafted by a Congress which recognized "an almost moral obligation" to protect airline employees. *See* Association of Flight Attendants' Brief at 41. However, whatever inequity the flight attendants may discern arises not entirely from the retroactive application of *Chadha* but, more precisely, from any judicial decision not to sever the remainder of section 43. Their arguments speaks to the Congressional intent important to the severance decision; they do not speak to the retroactivity *vel non of Chadha*.

There is, as yet, little case law on *Chadha's* retroactive application.[5] Three pre-*Chadha* cases in this circuit struck

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[5] The issue was raised in one case in the D.C. District Court, and the court there held that under a case-by-case analysis *Chadha* would apply retroactively to the Presidential Recordings and Materials Preservation Act, Pub.L. No. 93-526, 88 Stat. 1695 (1974). *See Allen v. Carmen*, 578 F.Supp. 951, 966-68 (D.D.C. 1983). The Temporary Emergency Court of Appeals has also considered the question. In *Exxon Corp. v. United States Department of Energy*, 744 F.2d 98 (T.E.C.A.), *cert. denied*, —— U.S. ——, 105 S.Ct. 576, 83 L.Ed.2d 515 (1984), the court held that *Chadha* should not be

down legislative veto provisions as unconstitutional, *see Amercan Federation of Government Employees v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982); *Consumers Union of the United States, Inc. v. Federal Trade Commission*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd mem. sub nom. Process Gas Consumer Group v. Consumer Energy Council of America*, 463 U.S. 1216, 103 S.Ct. 3556, 77 L.Ed.2d 1402, 77 L.Ed.2d 1403, 77 L.Ed.2d 1413 (1983); *Consumer Energy Council of America v. FERC*, *supra*, 673 F.2d 425. Inasmuch as all three decisions were pre-*Chadha*, they are not of direct relevance to the issue of the retroactivity of *Chadha*. Furthermore, while *Pierce* relies on *Consumer Energy Council* and *Consumers Union*, the veto clause found unconstitutional in *Pierce* was enacted after this court's decision in *Consumer Energy Council*, hence the reliance on *Consumer Energy Council* was not a retroactive application. On the other hand, the Supreme Court's summary affirmance of *Consumers Union* and

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applied retroactively. But, the retroactive application under discussion was as to obligations imposed by, and regulations adopted pursuant to, the infirm statutes prior to *Chadha*. The court found substantial inequitable results in voiding such obligations and regulations. In our view, this analysis should not be extended to the case at hand in which the regulations were adopted post-*Chadha*. Other cases do not directly address the issue. For example, in *Equal Employment Opportunity Commission v. Hernando Bank, Inc.*, 724 F.2d 1188 (5th Cir. 1984), the legislative veto provision of the Reorganization Act of 1977, Pub.L. No. 95-17, 91 Stat. 29 (1977), was held unconstitutional, but the provision was ruled severable; thus, the issue of retroactive application *vel non* lost any importance. In *Equal Employment Opportunity Commission v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), the Second Circuit reached the opposite conclusion on severability of this provision. The entire Reorganization Act was held unconstitutional and the EEOC was found to have no authority to enforce the Age Discrimination in Employment Act ("ADEA"), Pub.L. No. 90-202, 81 Stat. 602 (1967). Having reached that conclusion, the court did discuss retroactivity, but it was the retroactivity of its ruling regarding the ADEA. The retroactivity of the *Chadha* decision must have been assumed, however, inasmuch as the Second Circuit ultimately concluded that the EEOC was lacking in authority.

Consumer Energy Council was rendered after *Chadha*. That summary disposition, while obviously enjoying less precedential signficance than a case afforded plenary consideration, *see, e.g., Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977); *Fusari v. Steinberg*, 419 U.S. 379, 391-92, 95 S.Ct. 533, 540-41, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring), might be viewed as assuming *Chadha*'s retroactive application.

The airlines advance one additional argument in favor of retroactive application. They note observations in both Justice Powell's concurrence in *Chadha, supra*, 462 U.S. at 959, 103 S.Ct. at 2788 ("The Court's decision . . . apparently will invalidate every use of the legislative veto.") (Powell, J., concurring), and Justice White's dissent, *id.* at 967, 103 S.Ct. at 2792 ("Today the Court . . . sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.' ") (White, J., dissenting), that the Court's ruling would invalidate all legislative veto provisions. The airlines emphasize that the opinion of the Court did not respond to these observations, while it did respond to others offered by the dissent; the airlines draw from this an indication that the Court has indicated that *Chadha* should have retroactive effect. This is a weak reed on which to rest. Failure to respond to these comments is, at bottom, probative of nothing. Nonetheless, when all is said and done, we agree, by virtue of the analysis previously set forth, that *Chadha* should be given retroactive effect.

II

Having disposed of these preliminary inquiries, we turn now to the question of the severability *vel non* of the remainder of section 43 from the unconstitutional legislative veto provision.[6] Since it is, of course, a veto provision

[6] For an excellent, early treatment of the Supreme Court's development of severability analysis, see Robert Stern's article of almost a half century ago, *Separability and Separability Clauses in the Supreme Court*, 51 HARV.L.REV. 76 (1937).

whose severability is in question, the severability analysis set forth in *Chadha* itself is particularly instructive for us. In *Chadha*, the Court stated that "the invalid portions of a statute are to be severed ' "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." ' " *Chadha, supra*, 462 U.S. at 931-32, 103 S.Ct. at 2774 (quoting *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932)). "A provision is further presumed severable if what remains after severance 'is fully operable as a law.' " *Chadha, supra*, 462 U.S. at 934, 103 S.Ct. at 2775 (quoting *Champlin, supra*, 286 U.S. at 234, 52 S.Ct. at 564). While the immigration statute at issue in *Chadha* contained a severability clause, thus distinguishing it from the Airline Deregulation Act before us,[7] the analyti-

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[7] It is not clear what weight is to be given to the absence of a severability clause.

> The presence of a severability clause, which expressly sets forth congressional intent that a statute stand in the event one of its provisions is struck down, makes it extremely difficult for a party to demonstrate inseverability. When there is no such clause, however, as in this case, the test is less certain.

Consumer Energy Council of America v. FERC, supra, 673 F.2d at 441 (footnote omitted).

Here, even less weight is merited than might ordinarily be attributed to such an absence. Several of the appellants argue that section 43 of the Airline Deregulation Act amended the Federal Aviation Act, Pub.L. No. 85-726, 72 Stat. 731 (1958), a statute already containing a severability clause, *see* 49 U.S.C. app. § 1301 note (1982). *See* Brief of Appellants Brotherhood of Railway and Airline Clerks, Flight Engineers' International Association, International Association of Machinists and Aerospace Workers, and Transport Workers Union of America at 12-13. Appellees retort that while section 43 of the ADA is codified along with the Federal Aviation Act, the "[s]ection was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation

cal framework enunciated by *Chadha* applies to the severability issue which we are called upon to resolve.

Chadha presumes severability of the offensive provision if what remains after severance is fully operable as law. To this end, the burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision without the severed portion.[8] This presumption articulated by *Chadha* was echoed in a later Supreme Court severability case: "Whether an unconstitutional provision is severable from the remainder of the statute in which it appears

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Act of 1958 which comprises this chapter," 49 U.S.C. app. § 1552 note (1982). They contend that the severability clause thus does not encompass section 43. *See* Appellees' Brief at 16 n.*.

The Airline Deregulation Act is, by its own terms, an act to amend the Federal Aviation Act. *See* Pub.L. No. 95-504, 92 Stat. 1705, 1705 (1978). Many provisions of the ADA do, in fact, specifically amend provisions of the Federal Aviation Act, while section 43 does not. It is, instead, simply a provision added to the U.S. Code. Whether the severability clause of the Federal Aviation Act carries over to section 43 is thus unclear. We do not resolve that question, but note only that the point may not have been clear to Congress that it was not so included; we will thus not read any legislative intent into the absence of an *additional* severability clause specifically encompassing section 43.

[8] This court has held the presumpytion to be unimportant in a pre-*Chadha* legislative veto severability case. *See Consumer Energy Council of America v. FERC*, *supra*, 673 F.2d at 442 ("We think the question where the presumption lies is mostly irrelevant, and serves only to obscure the crucial inquiry whether Congress would have enacted other portions of the statute in the absence of the invalidated provision. . . . We do not view the imposition of any unspecified burden of persuasion on either side as beneficial to the inquiry."). Since the *Consumer Energy* court found the provision severable, its holding is not at odds with later Supreme Court opinions. Furthermore, the court was focusing on what presumption should be derived from the absence of a severability clause. The conclusion that no presumption was to be drawn from that particular fact may not have been applicable to the general presumption in favor of severability.

is largely a question of legislative intent, but the presumption is in favor of severability." *Regan v. Time, Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984). The Court has thus clearly laid down a presumption in favor of severability if what remains is operative as law; in a word, severance lies unless it is "evident" that what remains would not have been enacted.

Our charge is to save as much of the statute as we can,[9] consistent of course with the underlying legislative intent. Only if we conclude that Congress would not have included a provision absent the constitutionally flawed portion is that provision to fall. The issue cannot be whether Congress preferred the statute with the unconstitutional provision over the same statute without that provision. Manifestly, Congress' preference is abundantly clear from its inclusion of the unconstitutional provision. Nor is the question whether Congress would have passed some alternative version of the statute if it knew that it could not lawfully have included the offending provision. That is, "the question is not whether Congress would have enacted th[is] *exact* statute[] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[], after severance of the legislative veto provision[], to no statute[] at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (T.E.C.A.) (emphasis in original), *cert. denied*, —— U.S. ——, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984).

Section 43 of the ADA is an extensive and elaborate provision, yet only one part of one subsection, namely section 43(f)(3), is unconstitutional under *Chadha*. That

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[9] "The cardinal principle of statutory construction is to save and not to destroy.'" *Tilton v. Richardson*, 403 U.S. 672, 684, 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790 (1971) (plurality opinion) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)).

section, codified at 49 U.S.C. app. § 1552(f)(3), contains two provisions, as we have seen. The first, the so-called "report and wait" provision, is left unaffected in *Chadha*'s wake; the second is, of course, the legislative veto provision constitutionally eviscerated by *Chadha*. If the veto provision were severed, the remainder of the section (including the first sentence of the subsection) would be fully operable as law. The employee protection program would still be spelled out in great detail, and the Secretary of Labor would still retain authority to promulgate the necessary rules and regulations. The sole difference would be that the Secretary would be required only to submit the rules and regulations to the appropriate Congressional committees on a "report and wait" basis rather than expose those regulations to the gauntlet of possible invalidation by way of an exercise of the purported veto authority.

To overcome the presumption of severability with respect to this provision, the airlines must show, as we have seen, that it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality. Or, as the Temporary Emergency Court of Appeals would put it, the challengers must show that it is evident that Congress would have preferred no airline employee protection provision at all to the existing provision *sans* the veto provision. Not only is evidence for that position lacking, what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision. That is to say, the evidence, in our view, positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan. It is to that evidence that we now turn.

The employee protection provisions contained in the Airline Deregulation Act had their genesis in the Senate bill. The Senate Report is thus particularly instructive as to the importance Congress attributed to that program. Noting the concern expressed by airline employees over the security of their jobs once deregulation was effected, the Senate Report stated:

> The Committee felt that this concern [of airline employees] should not be ignored and that careful consideration of the question of employee protection programs was warranted. The Committee concluded that the kind of employee dislocations that might occur as a result of the new regulatory structure should be dealt with by a statutory employee protection program, as has been done in certain cases in the past. . . . The Committee believes that the Congress . . . must insure that the benefits to the public which result from its decision to alter substantially the regulation of air transportation are not paid for by a minority—the airline employees and their families who have relied on the present system.

S. Rep. No. 631, 95th Cong., 2d Sess. 113-14 (1978). To that end, the Senate bill, S. 2493, included an employee protection program very much like the regime that was ultimately adopted. *See* Conference Report, H.R. Rep. No. 1779, 95th Cong., 2d Sess. 105 (1978), U.S. Code Cong. & Admin. News 1978, pp. 3737, 3813 (observing that the Conference substitute was "basically the same as the Senate bill" with certain stated exceptions, including some reworking of the subsection containing the veto provision).

The House bill, H.R. 12611, also contained an employee protection program. As explained by the House Report:

> The bill stipulate[d] that no authority granted by th[e] act shall be exercised by any carrier unless

> the Secretary of Labor has certified to the CAB that interests of employees have been adequately protected by fair and equitable arrangements, with benefits no less than those established pursuant to section 5(2)(f) of the Interstate Commerce Act and section 405 of the Rail Passenger Service Act.

H.R. Rep. No. 1211, 95th Cong., 2d Sess. 26 (1978), U.S. Code Cong. & Admin. News 1978, pp. 3737, 3762. That this provision was viewed both as an important feature of the bill and as being stronger than the Senate plan is evidenced in the various comments disparaging the perceived reduction in protection resulting from the Conference substitute.[10]

The airlines argue, however, that "Congress was uncertain about the need for additional labor protection beyond that already available through the CAB." Appellees' Brief at 41. This is quite true. Indeed, statements in the legislative history reasonably can be read as evidencing a sense that employee protection was not in fact vital to the crafting of a comprehensive deregulatory regime. Those statements stemmed not from legislative oversight or, worse yet, callousness to the potential plight of displaced workers, but reflected, rather, the

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[10] *See* 124 Cong.Rec. 38,522 (1978) (statement of Rep. Anderson) ("The House provisions on employee protection . . . were stronger than those in the conference bill."); 124 Cong.Rec. 38,523 (1978) (statement of Rep. Harsha) ("I am not totally satisfied with the conference agreement on the provision for employee protection. . . . [B]enefits are not to be paid . . . until there is at least 7½ percent employee reduction in the airline. It makes no sense to me to defer these benefits until this percentage trigger is reached. . . . However, in the spirit of compromise we managed to reduce by one-half the percentage trigger contained in the Senate bill."); 124 Cong.Rec. 38,524-25 (1978) (statement of Rep. Mineta) ("I am . . . compelled to rise to express my grave concern about the employee protection program included in [the ADA]. . . . By comparison with the House-passed provision, the conference agreement—which was based on the Senate language—is not much protection at all.").

sincerely held belief in various legislative quarters that loss of employment in a deregulated industry was unlikely.[11] While that sentiment is certainly present in the debate, as the airlines correctly and understandably emphasize, the sentiment does not, upon analysis, truly speak to the precise issue at hand. For, inherent in notion of increased competition in the industry is the reality that some carriers will likely lose business, while other carriers will gain. Thus, in Congress' view at the time, while total employment within the industry, once deregulated, might well remain stable or grow, individual employees might nonetheless lose their jobs due to deregulation; and, on the other hand, jobs with other carriers would likely become available. The preferred hiring status provisions fashioned by Congress would thus move those employees who lost their jobs into the newly opened or created positions.

In our view, legislative comments with respect to the overall employment picture within the industry speak more to the provision for payment of benefits from federal coffers than to the first hire provisions. Congress deemed it unlikely that the former provision would, in fact, come into play; that sense of the National Legislature is eloquently evidenced by the fact that Congress to

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[11] *See* S.REP. No. 631, 95th Cong., 2d Sess. 119 (1978) ("it is highly unlikely that such payments [by the Government to displace employees] will ever be necessary"); 124 Cong.Rec. 37,417 (1978) (statement of Sen. Pearson) ("Some say that the bill may have a harmful effect on labor while others argue to the contrary. I believe that this legislation will be good for labor, management, and the investor."); 124 Cong.Rec. 37,419 (1978) (statement of Sen. Kennedy) ("the indicators are all positive, and employment will continue to increase as the carriers respond to the changes and new opportunities deregulation has brought"). *But see* S.REP. No. 631, 95th Cong., 2d Sess. 221 (1978) (Minority view of Sen. Inouye) ("That supporters of the legislation recognize the very real possibility of these consequences [loss of jobs for airline personnel and support workers] is . . . evidenced by adoption in Committee of an 'employee protection' amendment.").

this day has not funded that program. These comments thus do not speak, as the airlines would read them, to the "first hire" provisions. Indeed, the "first hire" provisions could, in theory, play a constructive fiscal role in keeping potentially costly federal relief provisions from being triggered in the first instance. These comments, then, do nothing to counter the evidence that Congress placed great importance on the existence of the employee protection plan as an integral part of a comprehensive deregulatory regime.

In stark contrast to the numerous comments indicating the importance of the employee protection plan, the only discussion cited by the parties with respect to the veto provision is a solitary comment by then-Representative Elliott Levitas of Georgia expressing approval of the presence of a legislative veto in the provision.[12] Not only is this sole source a thin reed for eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees but, what is more, Rep. Levitas was a vigorous advocate generally for the proposition, eviscerated by *Chadha*, that Congress must retain control over administrative agencies via the legislative veto device.[13] Now to be sure, Rep.

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[12] I am happy to say that this piece of legislation contains a one-House veto over the regulations which may be issued by the Secretary of Labor on the labor protection provisions, so that the Congress and not an unelected bureaucrat will have the final word on regulations that will have the effect of law.

124 Cong.Rec. 38,524 (1978) (statement of Rep. Levitas). By his own description, Rep. Levitas was "making [an] observation," *id.*, not setting forth what he was maintaining to be an indispensable legislative ingredient of an acceptable bill.

[13] In a post-*Chadha* article, then-Representative Levitas and his co-author, former counsel to the House of Representatives, Stanley M. Brand, stated:

> As Congress increasingly delegated authority, the bureaucratic agencies . . . swelled in number and in the size of their

Levitas was, as the airlines rightly emphasize, a member of the Conference Committee for the Airline Deregulation Act and of the House Committee on Public Works and Transportation, the committee to which the House bill was referred. Thus, his statement was not one merely of a zealous advocate championing his well-known position in favor of lavishly sprinkling regulatory (or deregulatory) legislation with legislative veto devices. However, there is not a shred of evidence that Rep. Levitas' statement represented the view of Congress as a whole (or even his full Committee), nor is there any indication that Congressman Levitas himself attached especial significance to this particular veto provision, as opposed to his keen interest generally in seeing the incorporation of such devices in legislation enacted by the Congress.

Failing to find any direct statement evidencing a Congressional intent of inseverability, appellees advance various items of circumstantial evidence of what they

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personnel. These agencies were given the authority to write rules and regulations that govern our society with the same force and effect as the laws written by the elected Congress. In order to maintain its control over this authority, Congress often—though not often enough in our opinion and in the opinion of others—required that these rules and regulations be subjected to congressional review, and if the Congress deemed appropriate, a legislative veto.

* * * *

Under our system of government, which is based on democratic principles, those who are accountable to the people must have the final say over the rules and regulations that have the force and effect of law. If Congress finds that a rule or regulation is arbitrary, oppressive, or contrary to the intent of the law, then *the Congress* ought to have the right to stop that rule from going into effect. The legislative veto provided a means for doing that.

Levitas & Brand, *The Post Legislative Veto Response: A Call to Congressional Arms*, 12 HOFSTRA L.REV. 593, 611-12 (1984) (emphasis in original).

perceive to be such an intent. Appellees first point to the fact that only section 43 of the Act is subject to the veto provision. That fact, however, is hardly surprising. The Act was, of course, a deregulatory statute, as its very name suggests, whereas section 43 was, for lack of a better term, a regulatory provision. It is, as a matter of common sense, the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device. That fact, however, still does not speak to whether Congress would have preferred no employee protection plan at all, as opposed to a plan containing a "report and wait" mechanism but lacking a veto provision.

The airlines also argue that the legislative veto provision in section 43 is "distinctive among the almost 200 legislative veto provisions which Congress has included in federal statutes." Appellees' Brief at 22. Admittedly, the provision reflects, as a whole, a unique combination of features. For one thing, as we have seen, a "report and wait" requirement exists alongside the veto, *see* 49 U.S.C. app. § 1552(f)(3); in addition, a requirement is imposed upon the Secretary of Labor to promulgate rules and regulations necessary to carry out the section within six months after October 24, 1978, *see* 49 U.S.C. app. § 1552(f)(2). It is not clear to us that anything of decisional import is to be drawn from the inclusion of these features.

The "report and wait" requirement simply directs the submission of rules and regulations, prior to issuance as final rules, to particular oversight committees of Congress. This mechanism may reasonably be viewed as the assertion of an interest by committees not normally charged with the review of labor regulations but directly concerned with the airline industry over labor regulations affecting deregulation of that industry. This understandable interest does not indicate that the veto is inseverable, particularly since the "report and wait" clause remains inviolate notwithstanding *Chadha*.

Neither is it clear what conclusion is to be drawn from the six-month requirement imposed on the Secretary. The airlines suggest that this subsection was designed to insure that the regulations would be reviewed by essentially the same members of Congress who had shaped the Airline Deregulation Act. While an election would have intervened between the passage of the Act and the required time of submission, the historical experience of reelections of incumbents might presumably lend some credence to this interpretation. Nonetheless, like election predictions, this approach is all purely speculative. The provision could just as readily be seen in an indication of the high importance Congress attached to the employee protection plan, which Congress therefore mandated be implemented as quickly as possible. Furthermore, even assuming *arguendo* appellees' point, that view fails, at bottom, to speak to the issue at hand. From it, we cannot conclude that Congress, or even the committees involved, would have preferred no employee protection plan to the adopted plan divorced of its legislative veto provision.

Appellees also seek support in the treatment of the veto provision, and the protection plan as a whole, in the deliberations of the Conference Committee. They argue that

> the House accepted the Senate's novel concept of an [employee protection plan] that it had not theretofore embraced, but only with a significantly strengthened legislative review provision. The terms of this compromise constitute strong evidence of nonseverability because, as in [*American Federation of Government Employees v. Pierce*, *supra*], one house accepted the overall thrust of the other house's conflicting legislation, but only with the veto-related restrictions incorporated.

Appellees' Brief at 33 (footnote omitted). The airlines thus argue that the decision here should be influenced by our decision in *Pierce*, a case in which a veto provision

was held inseverable. However, *Pierce* is readily distinguishable from the case at hand. *Pierce* concerned a provision of an appropriations act for the Department of Housing and Urban Development, Pub. L. No. 97-272, 96 Stat. 1160, 1164 (1982), which provided that funds could not be used for any reorganization by HUD, prior to January 1, 1983, without prior approval of the two Appropriations Committees. The district court had assumed the invalidity of the approval clause and severed it from the remainder of the provision. This court reversed, finding intent of nonseverability. However, as we shall now see, the Conference Committee compromise providing the evidence of inseverability in *Pierce* differed totally from the compromise reached in conference with respect to the Airline Deregulation Act.

In *Pierce*, the House had "never put forward a provision without a committee approval clause tied to it." *Pierce, supra*, 697 F.2d at 307. On the other hand, "the Senate initially opposed any restraint on the Department . . . [and] the Senate Committee[] clearly expressed reservation about the House version of the bill." *Id.* The Conference Committee compromise gave control to the Appropriations Committees, but only for a limited duration. Neither House, it was abundantly clear in *Pierce*, would have accepted a complete ban on reorganizing HUD—yet that is precisely the result severance would have brought about.

The Conference Committee compromise reached here bears no resemblance at all to the situation in *Pierce*. As to the airline deregulation bill, the Conference adopted, for the most part, the Senate bill's employee protection plan. That plan contained a veto clause, to which the Conference Committee added the "report and wait" provision. Even if the "report and wait" provision may be viewed as designed to strengthen the legislative veto provision, we have found no evidence that the

House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device. In fact, the House's protection plan was viewed, at least by several Representatives, as being much stronger than the Senate's plan. *See supra* note 10. It seems to us unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy. Nor have we found any indication that the Senate's agreement to the minor modifications in its version of the plan was premised on a "strengthening" of the veto provision. In short, we conclude that *Pierce* is wholly inapposite to the case at hand.

III

We emerge from our trek through the legislative history of the Airline Deregulation Act far short of the destination that must be reached for the airlines to prevail. We fail to find satisfied here the exacting inseverability standard that it be "evident" that Congress would have preferred no employee protection program over the program passed by Congress shorn of its veto provision. Ample evidence persuades us that the employee protection program, whatever its merit, was deemed by Congress to be an important aspect of the Act. In contrast, there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan.

In sum, we hold the legislative veto provision here to be severable from the remainder of the employee protection provisions; the remainder of section 43 therefore remains viable. However, since the District Court did not have occasion to rule on the other grounds advanced by the airlines in their challenge to the rules adopted by the Secretary, the case is remanded to that court for consideration and adjudication of those issues.

Reversed and remanded.

GINSBURG, Circuit Judge, concurring in the judgment.

The court's intricate discussion of preliminary issues seems to me distracting. As I view this case, only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions. Before the district court, the Department conceded the unconstitutionality of the veto, and does not contest that matter here. Therefore, we face no appeal from decision of a constitutional question; instead, a ripe statutory interpretation controversy—a construction of legislation dispute securely within our appellate jurisdiction—is before us. Furthermore, as the court recognizes, at 1558-1559 & n. 5, a ruling that the labor protective prescriptions are severable strips discourse on *Chadha's* "retroactive application" of "any importance."

On the severability question, I am in full agreement with the court's judgment, which undertakes a moderate salvage operation. Deletion of the veto preserves section 43 and thereby gives effect to the dominant intent of Congress. A declaration of inseverability, tearing down the section in its entirety, would be far more destructive of the legislature's will. *Cf. Buckley v. Valeo*, 424 U.S. 1, 108-09, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (per curiam).

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 84-0485

ALASKA AIRLINES, INC., *et al.*,
Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,
Defendants;

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL; ASSOCIATION OF FLIGHT ATTENDANTS; and BROTHERHOOD OF RAILWAY and AIRLINE CLERKS, ETC.,
Intervening Defendants.

May 18, 1984

MEMORANDUM

GESELL, District Judge.

This case challenges the validity of § 43 of the Airline Deregulation Act (ADA), Pub.L. No. 95-504, 92 Stat. 1705 (1978), as well as the validity of regulation implementing § 43. The federal government undertook extensive control over commercial airline operations beginning in the 1930's. The Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, 49 U.S.C. § 1301 *et seq.*, granted to the Civil Aeronautics Board (CAB) broad powers to regulate nearly every aspect of

the industry. This structure was dramatically altered in 1978, however, with the passage of the Airline Deregulation Act. In the sweeping provisions of this Act the CAB was directed to take steps to gradually lessen and finally abolish nearly all economic regulation of the airline industry; indeed, the Act provided for the CAB itself to go out of existence by 1985.[1]

In anticipation of the upheaval and possible economic hardship which might result from deregulation, Congress enacted as § 43 of the Act an "Employee Protection Program" (EPP). This provision had two closely linked components: an "assistance payments" program by which the Secretary of Labor, "subject to such amounts as are provided in appropriations Acts," would make monthly assistance payments to certain "protected" airline employees laid off as a result of deregulation, and a "first hire" program by which carriers certificated by the CAB as of a particular date would be required to his "protected" employees laid off by other carriers before hiring other individuals not previously furloughed by the hiring airline itself. Many aspects of these programs were left unresolved by the terms of § 43.

The Secretary of Labor was directed by § 43(f) to issue the regulations necessary to carry out the Employee Protection Program within six months, subject to legislative veto before they became effective. Despite the six-month deadline, final regulations were not proposed for the "first hire" program until 1983. Airline Employee Protection Program, 48 Fed.Reg. 52,854 (Nov. 22, 1983). These regulations are now scheduled to become effective immediately. The Secretary has yet to issue regulations covering the assistance payments program, which Congress has never funded.

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[1] ADA § 40. Certain of the CAB's functions are to be transferred to other agencies. Safety regulation, which is controlled by the Federal Aviation Administration, remains unaffected by the ADA.

Plaintiffs, fifteen airlines subject to these new regulations, challenge the validity of both the regulations and of § 43 itself. Several airline employee unions have intervened as defendants or filed briefs *amici curiae*. After full briefing and oral argument, cross-motions to dismiss or for summary judgment are now before the Court. Because the Court concludes that § 43 is unconstitutional in its entirety due to its special provision for a legislative veto, summary judgment must be granted for plaintiffs.[2]

Section 43(f) states:

> (f) Rules and Regulations.—(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.
>
> (2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after the date of enactment of this section.
>
> (3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regula-

[2] Plaintiffs' other legal contentions need not be reached.

> tions, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.
>
> (4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

As the government concedes, the legislative veto provision found in § 43(f)(3) is unconstitutional under the Supreme Court's holding in *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The issue therefore is whether this defective portion of § 43 can be "severed" from the rest of that section and the remainder enforced as valid law, or whether the legislative veto provision is so fundamentally a part of that provision that it unconstitutionally infects the entire section.

The proper analysis to be followed in determining the issue of severability is well established. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may be dropped if what is left is fully operative law." *Buckley v. Valeo*, 424 U.S. 1, 108, 96 S.Ct. 612, 677, 46 L.Ed.2d 659 (1976) (*per curiam*), *quoting Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234, 52 S.Ct. 559, 564, 76 L.Ed. 1062 (1932). *See also Chadha*, 103 S.Ct. at 2774. "[T]he crucial inquiry [is] whether Congress would have enacted other portions of the statute in the absence of the invalidated provision." *American Federation of Government Employees v. Pierce*, 697 F.2d 303, 307 (D.C.Cir.1982), *quoting Consumer Energy Council of America v. FERC*, 673 F.2d 425, 442 (D.C.Cir.1982), *aff'd mem.*, —— U.S. ——, 103 S.Ct. 3556, 77 L.Ed. 1402 (1983).[3]

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[3] The question is not, of course, whether Congress would have enacted *some* type of employee protection plan in the absence of a

Several aspects of § 43 lead the Court to conclude that Congress considered the legislative veto provision to be integral to the EPP and that Congress would not have enacted § 43 in its present form without such a provision. First, and most significant, § 43 is the only section in the entire Airline Deregulation Act where a legislative veto provision appears. Unlike with many other statutes, the Court is faced here not with a legislative veto provision which applies to an entire statute, but with a veto provision applicable to one, and only one, particular section of a long and comprehensive piece of legislation. It is apparent from the face of the statute, therefore, that Congress enacted § 43 with the understanding firmly in mind that regulations issued by the Secretary would be subject to legislative veto.

The importance to Congress of the legislative provision of § 43 is reinforced by the language of that section. Subsections 43(f)(3) and (4) provide very explicit procedures under which proposed regulations are subject to congressional review before they can become effective. Final regulations must be submitted for review to specific congressional committees 30 days before they are issued, and once issued do not become effective until both Houses of Congress have adopted resolutions approving the regulations or 60 "legislative" days have passed without either House adopting a resolution of disapproval. These elaborate procedures are, in fact, apparently unique among the nearly 200 statutory legislative veto provisions enacted by Congress in the extent

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legislative veto provision; rather, the issue is whether Congress would have enacted the *same* statute. If not, the Court cannot enforce the remainder of the statute merely because it might be an approximation of what Congress would have enacted. The task of determining the most preferable alternative to an unconstitutional statute belongs not to the courts, but to Congress itself.

to which they ensure congressional control over the regulatory process.[4]

The language of § 43's substantive provisions and the circumstances in which the ADA was enacted also support the view that Congress intended the veto provision to be integral to § 43. Both the assistance payment and first hire provisions provide the Secretary with only general guidance in determining how those programs should be structured and operated. Moreover, as the congressional debates make clear the effects of airline deregulation were highly uncertain. Congress obviously thus could not foresee the precise nature or cost of the EPP or the problems which might arise under it. Such circumstances are consistent with and reinforce indications in the language of the veto provision itself that Congress' grant of such broad authority to the Secretary was intended to be contingent on being subject to a legislative veto.

The government points out that there is relatively little discussion of the veto provision in the legislative history of the Act, at least with respect to the first hire program. The mere lack of extensive discussion of the veto provision, however, does not support the conclusion that Congress considered that provision insignificant, and what legislative history there is in fact supports the view that Congress considered the veto provision to be an important part of § 43. While the reasons for doing so are apparently not fully recorded, the Conference Committee report indicates that the legislative veto provision, taken from the Senate bill, was significantly

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[4] A summary of legislative veto provisions can be found in The Supreme Court Decision in *INS v. Chadha* and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 1st Sess. 24-72 (appended to statement of Edward C. Schmults, Deputy Attorney General).

strengthened before passage by the addition of the requirement that final regulations be submitted to Congress thirty days before they are issued. House Conf.R. No. 95-1779, 95th Cong., 2d Sess. 105-06 (1978), U.S. Code Cong. & Admin.News 1978, p. 3737. This refutes the notion that the veto provision was mere boilerplate with which Congress was little concerned. The legislative history thus casts "grave doubt" that Congress would have enacted the Employee Protection Program in its present form without the accompanying legislative veto provision. *See Pierce*, 697 F.2d at 307.

"Congress did not declare the [veto] clause . . . to be severable," *Pierce*, 697 F.2d at 307 n. 5, and a court cannot simply assume that it is severable. In the words of Justice Frankfurter, construing legislation "is nothing like a mechanical endeavor . . . . [I]nevitably there enters into the construction of statutes the play of judicial judgment within the limits of the relevant legislative materials. Most relevant, of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Local 1976, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 357 U.S. 93, 100, 78 S.Ct. 1011, 1016, 2 L.Ed.2d 1186 (1958). Here the statutory language directly links the admittedly unconstitutional provision with the specific grant of rulemaking authority under attack. Absent a responsible basis for concluding that Congress did not consider the veto provision a central if not essential component of that grant of authority, and would thus have enacted the remainder of § 43 in its present form without it, the veto provision cannot be severed and § 43 must be declared unconstitutional in its entirety. In the Court's judgment the other "relevant legislative materials" do not supply such a basis; if anything, they reinforce the view that the legislative veto provision was intended to be an integral part of the entire section.

Taking into account the content and structure of the Airline Deregulation Act, the circumstances surrounding its enactment, and its legislative history, the Court thus finds lacking "sufficient evidence that Congress would have enacted the [Employee Protection Plan] provision without regard to the clause [providing for a legislative veto]." *Pierce*, 697 F.2d at 307 n. 5. The Court therefore concludes that the unconstitutional legislative veto provision of § 43 is inextricably bound to the remainder of that section and that Congress would not have enacted the remainder of § 43 in its absence.[5] Accordingly, an Order declaring § 43 unconstitutional in its entirety has been filed herein.[6]

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[5] Defendants suggest that the Court cannot strike down § 43 in its entirety without also striking down the entire Airline Deregulation Act. The Court has little difficulty in rejecting this argument, and extended discussion is not necessary. The Court notes, however, that Congress clearly considered the Employee Protection Program to be an ancillary, preventative measure it did not even expect would be used; it was enacted to deal with the mere "theoretical possibility that a major reduction might occur in the labor force of one or more airlines" as a result of deregulation. S.Rep. No. 631, 95th Cong., 2d Sess. 113 (1978). Nothing in the statute or legislative history even remotely suggests that Congress would not have passed the Act without the EPP or that in the absence of an EPP it would have taken a different approach to deregulation.

[6] The parties' cross motions were argued to the Court on May 4, 1984. Based on representations made in a motion filed by plaintiffs on May 16, 1984, that the Department of Labor had announced that the disputed regulations would become effective the next day, the Court on May 17, 1984, issued its Order disposing of the case. That Order stated that this Memorandum giving the Court's reasons would be filed at a later date.

APPENDIX C

CONSTITUTION OF THE UNITED STATES

Article I, Sec. 1

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives. Art. I, § 1.

Article I, Sec. 7, cl. 2

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States. . . .

Article I, Sec. 7, cl. 3

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

STATUTES

49 U.S.C. app. § 1552 (1982). Employee protection program.

(a) General rule

(1) The Secretary of Labor shall, subject to such amounts as are provided in appropriation Acts, make monthly assistance payments, or reimbursement payments, in amounts computed according to the provisions of this section, to each individual who the Secretary finds,

upon application, to be an eligible protected employee. An eligible protected employee shall be a protected employee who on account of a qualifying dislocation (A) has been deprived of employment, or (B) has been adversely affected with respect to his compensation.

(2) No employee who is terminated for cause shall receive any assistance under this section.

(b) Monthly assistance computation

(1) An eligible protected employee shall, subject to such amounts as are provided in appropriation Acts, receive a monthly assistance payment, for each month in which he is an eligible protected employee, in an amount computed by the Secretary. The Secretary, after consultation with the Secretary of Transportation, shall, by rule, promulgate guidelines to be used by him in determining the amount of each monthly assistance payment to be made to a member of each craft and class of protected employees, and what percentage of salary such payment shall constitute for each applicable class or craft of employees. In computing such amounts for any individual protected employee, the Secretary shall deduct from such amounts the full amount of any unemployment compensation received by the protected employee.

(2) If an eligible protected employee is offered reasonably comparable employment and such employee does not accept such employment, then such employee's monthly assistance payment under this section shall be reduced to an amount which such employee would have been entitled to receive if such employee had accepted such employment. If the acceptance of such comparable employment would require relocation, such employee may elect not to relocate and, in lieu of all other benefits provided herein, to receive the monthly assistance payments to which he would be entitled if this paragraph were not in effect, except that the total number of such payments shall be the lesser of three or the number remaining

pursuant to the maximum provided in subsection (e) of this section.

(c) Assistance for relocation

If an eligible protected employee relocates in order to obtain other employment, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reasonable moving expenses (as determined by the Secretary) for himself and his immediate family. In addition, such employee shall, subject to such amounts as are provided in appropriation Acts, receive reimbursement payments for any loss resulting from selling his principal place of residence at a price below its fair market value (as determined by the Secretary) or any loss incurred in cancelling such employee's lease agreement or contract of purchase relating to his principal place of residence.

(d) Duty to hire protected employees

(1) Each person who is a protected employee of an air carrier which is subject to regulation by the Civil Aeronautics Board who is furloughed or otherwise terminated by such an air carrier (other than for cause) prior to the last day of the 10-year period beginning on October 24, 1978, shall have first right of hire, regardless of age, in his occupational specialty, by any other air carrier hiring additional employees which held a certificate issued under section 1371 of this Appendix prior to October 24, 1978. Each such air carrier hiring additional employees shall have a duty to hire such a person before they hire any other person, except that such air carrier may recall any of its own furloughed employees before hiring such a person. Any employee who is furloughed or otherwise terminated (other than for cause), and who is hired by another air carrier under the provisions of this subsection, shall retain his rights of seniority and right of recall with the air carrier that furloughed or terminated him.

(2) The Secretary shall establish, maintain, and periodically publish a comprehensive list of jobs available with air carriers certificated under section 1371 of this Appendix. Such list shall include that information and detail, such as job descriptions and required skills, the Secretary deems relevant and necessary. In addition to publishing the list, the Secretary shall make every effort to assist an eligible protected employee in finding other employment. Any individual receiving monthly assistance payments, moving expenses, or reimbursement payments under this section shall, as a condition to receiving such expenses or payments, cooperate fully with the Secretary in seeking other employment. In order to carry out his responsibilities under this subsection, the Secretary may require each such air carrier to file with the Secretary the reports, data, and other information necessary to fulfill his duties under this subsection.

(3) In addition to making monthly assistance or reimbursement payments under this section, the Secretary shall encourage negotiations between air carriers and representatives of eligible protected employees with respect to rehiring practices and seniority.

(e) Period of monthly assistance payments

(1) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been deprived of employment shall be made each month until the recipient obtains other employment, or until the end of the 72 months occurring immediately after the month such payments were first made to such recipient, whichever first occurs.

(2) Monthly assistance payments computed under subsection (b) of this section for a protected employee who has been adversely affected relating to his compensation shall be paid for no longer than 72 months, so long as the total number of monthly assistance payments made under this section for any reason do not exceed 72.

(f) Rules and regulations

(1) The Secretary may issue, amend, and repeal such rules and regulations as may be necessary for the administration of this section.

(2) The rule containing the guidelines which is required to be promulgated pursuant to subsection (b) of this section and any other rules or regulations which the Secretary deems necessary to carry out this section shall be promulgated within six months after October 24, 1978.

(3) The Secretary shall not issue any rule or regulation as a final rule or regulation under this section until 30 legislative days after it has been submitted to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Public Works and Transportation of the House of Representatives. Any rule or regulation issued by the Secretary under this section as a final rule or regulation shall be submitted to the Congress and shall become effective 60 legislative days after the date of such submission, unless during that 60-day period either House adopts a resolution stating that that House disapproves such rules or regulations, except that such rules or regulations may become effective on the date, during such 60-day period, that a resolution has been adopted by both Houses stating that the Congress approves of them.

(4) For purposes of this subsection, the term "legislative day" means a calendar day on which both Houses of Congress are in session.

(g) Airline employees protective account

All payments under this section shall be made by the Secretary from a separate account maintained in the Treasury of the United States to be known as the Airline Employees Protective Account. There are authorized to be appropriated to such account annually, beginning with the fiscal year ending September 30, 1979, such

sums as are necessary to carry out the purposes of this section, including amounts necessary for the administrative expenses of the Secretary related to carrying out the provisions of this section.

(h) Definitions

For the purposes of this section—

(1) The term "protected employee" means a person who, on October 24, 1978, has been employed for at least 4 years by an air carrier holding a certificate issued under section 1371 of this Appendix. Such term shall not include any members of the board of directors or officers of a corporation.

(2) The term "qualifying dislocation" means a bankruptcy or major contraction of an air carrier holding a certificate under section 1371 of this Appendix, occurring during the first 10 complete calendar years occurring after October 24, 1978, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978, as determined by the Civil Aeronautics Board.

(3) The term "Secretary" means the Secretary of Labor.

(4) The term "major contraction" means a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period. Any particular reduction of less than 7½ percent may be found by the Board to be part of a major contraction of an air carrier if the Board determines that other reductions are likely to occur such that within a 12-month period in which such particular reduction occurs the total reduction will exceed 7½ percent. In computing a 7½-percent reduction under this paragraph, the Board shall not include employees who are deprived of employment because of a strike or who are terminated for cause.

(i) Transfer of authority of Board

The authority of the Board under this section is transferred to the Department of Transportation on January 1, 1985.

(j) Termination

The provisions of this section shall terminate on the last day the Secretary is required to make a payment under this section.

(Pub. L. 95-504, § 43, Oct. 24, 1978, 92 Stat. 1750.)

REFERENCES IN TEXT

The Airline Deregulation Act of 1978, referred to in subsec. (h)(2), is Pub. L. 95-504, Oct. 24, 1978, 92 Stat. 1705, as amended. For complete classification of this Act to the Code, see Short Title of 1978 Amendment note set out under section 1301 of this Appendix and Tables.

CODIFICATION

Section was enacted as part of the Airline Deregulation Act of 1978, and not as part of the Federal Aviation Act of 1958 which comprises this chapter.

TRANSFER OF FUNCTIONS

All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by section 1551 of this Appendix, effective in part on Dec. 31, 1981, in part on Jan. 1, 1983, and in part on Jan. 1, 1985.

For transfer of certain enforcement functions of the Secretary or other official of the Department of Transportation relating to compliance with this chapter and the authorizations and regulations issued thereunder to the Federal Inspector, Office of Federal Inspector of the Alaska Natural Gas Transportation System, see Transfer of Functions note set out under section 1301 of this Appendix.

REGULATIONS

Part 220—AIRLINE EMPLOYEE PROTECTION PROGRAM

Subpart A—Purpose and Scope of the Airline Employee Protection Program

Sec.

220.01 Definitions.
220.02 Purposes.
220.03 Scope.
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Subpart B—Designated Employees' Eligibility and Rights

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220.20 Duty to hire.
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220.22 Listing a vacancy.
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220.30 Designated employees' responsibilities.

Subpart E—Department of Labor's Responsibilities

220.40 Comprehensive job list.
220.41 List of protected employees.

Subpart F—Administration

220.50 Effective period of the program.
220.51 Disclosure of information.

Appendix I—U.S. Carriers certificated as of October 23, 1978 under Section 401 of the Federal Aviation Act of 1958, as amended.

Authority: Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1750-1753 (49 U.S.C. 1552).

(Secretary's Order No. 1-79, 44 FR 13093)

Subpart A—Purpose and Scope of the Airline Employee Protection Program

§ 220.01 Definitions.

As used in this Part, unless the content otherwise indicates:

(a) "Act" means the Airline Deregulation Act of 1978, Public Law 95-504, 92 Stat. 1705.

(b) "Air Carrier" means an air carrier certificated under Section 401 of the Federal Aviation Act of 1958 (49 U.S.C. 1371).

(c) "Center" means the entity or location which from time to time may be designated by the Secretary to receive, maintain and distribute the job listing information required by this Part.

(d) "Corporate officer" means an individual who holds any officer's position established pursuant to the Articles of Incorporation or bylaws of any air carrier, or who is otherwise identified as an officer by any air carrier, in filings with the Federal Aviation Administration, Civil Aeronautics Board or Securities and Exchange Commission or in any reports to stockholders or any public communications of an air carrier.

(e) "Covered air carrier" means an air carrier which was certificated prior to October 24, 1978 (A listing of such carriers appears as an appendix to these regulations).

(f) "Designated employee" means a protected employee who meets the eligibility requirements set forth in Section 220.10.

(g) "Effective period" means the period commencing on the effective date of these regulations and ending on the later of: (1) October 23, 1988, or (2) the last day of the final month in which the Secretary is required to make a payment under Section 43 of the Act; except that nothing in these regulations shall preclude the exercise of statutory rights and duties between October 24, 1978, and the effective date of these regulations.

(h) "Eligibility period" means the ten-year period beginning on October 24, 1978.

(i) "Employment relationship" means an attachment to a covered air carrier which includes, but is not limited to, compensated service, furlough, leave, or strike.

(j) "Equal employment opportunity requirement" means a specific equal employment requirement, pursuant to a federal court or administrative order, consent decree, or conciliation agreement, requiring that named individuals or specific members of a class are entitled to relief by virtue of the carrier's unlawful employment discrimination.

(k) "Occupational specialty" means the class, craft, or field of endeavor in which an individual was employed at the time of separation from a covered air carrier or in which the employee was employed during the 12 months immediately preceding the date of separation.

(l) "Protected employee" means a person other than a member of the Board of Directors or corporate officer of a covered air carrier:

(1) Who had an employment relationship with a covered air carrier on October 24, 1978, and

(2) Who on October 24, 1978, had four years of employment or four years accrued seniority with a single covered air carrier. The term employee shall include any full or part-time employee other than an employee in seasonal or temporary employment as defined herein. As used herein four years of employment shall mean not less than 48 months (whether or not consecutive) in which the employee actually completed the minimum number of hours of regular employment required for such employee's craft, class or position under the then applicable requirements of the employing carrier.

(m) "Seasonal employment" means employment during limited periods of the year due to peak market conditions or other factors which are periodic in nature, and in positions which do not confer seniority or recall rights.

(n) "Secretary" means the Secretary of Labor of the United States.

(o) "Temporary employment" means employment of limited duration which does not confer seniority or recall rights.

(p) "Terminated," means, unless expressly provided to the contrary, termination of employment, other than for cause.

(q) "Terminated for cause" means the separation of an individual from employment initiated by an air carrier for violation of such carrier's rules, policies, procedures, or practices pertaining to employee standards of conduct, job performance, or dependability.

(r) "Vacancy" means an employment opportunity other than seasonal or temporary employment, which an air carrier seeks to fill from outside its existing or furloughed work force.

§ 220.02 Purpose.

Section 43(d) of the Act provides a first-right-of-hire for designated employees of covered air carriers. The regulations in this Part are issued to effectuate section 43(d)(1) and (2) of the Act (hereinafter referred to as the Rehire Program).

§ 220.03 Scope.

(a) The Rehire Program is applicable only to designated employees, as more fully set forth herein, and only those employees who are expressly granted a hiring preference under the Act and these regulations have any rights under the Rehire Program. The Secretary of Labor will also publish a comprehensive list of jobs available with air carriers.

§ 220.04 Responsibilities of the Secretary of Labor.

The Secretary of Labor is responsible for administering the Rehire Program, and the Assistant Secretary for Labor-Management Relations, Labor-Management Services Administration (LMSA), has been delegated responsibility for the following:

(a) The development and promulgation of policies, regulations and procedures covering the first-right-of-hire provisions of Section 43(d)(1) of the Act;

(b) The development and promulgation of policies, regulations, and procedures covering the comprehensive job list required under Section 43(d)(2) of the Act; and

(c) The establishment and implementation of reporting requirements for air carriers to obtain pertinent information necessary for fulfilling the Secretary's responsibilities under Section 43(d)(2) of the Act.

Subpart B—Designated Employees' Eligibility and Rights

§ 220.10 Eligibility requirements.

(a) To qualify as a designated employee eligible for rights under this Part 220, an applicant must be a protected employee who is involuntarily placed on furlough or is terminated by a covered air carrier during the eligibility period.

(b) A protected employee shall not be deemed to be furloughed or terminated if such employee:

(1) Retired voluntarily;

(2) Was required to retire by virtue of reaching the mandatory retirement age, if any, established by a covered air carrier or as prescribed by any government agency with regulatory authority over a covered air carrier;

(3) Retired due to a disability;

(4) Is on strike or is withholding services in support of other employees who have struck the covered air carrier;

(5) Is terminated for cause as defined in § 220.01;

(6) Resigned or voluntarily quit for any reason.

(c) A designated employee who is recalled by his former carrier is no longer eligible under this section to exercise the first-right-of-hire. Such a person may become a designated employee in the future due to a subsequent termination or furlough which occurs on or prior to the expiration of the eligibility period.

§ 220.11 Designated employees' rights.

(a) A designated employee shall have a first-right-of-hire in such employee's occupational specialty, regardless of age, with any covered air carrier hiring additional

employees; *Provided, however,* That each designated employee must satisfy all qualifications or other requirements established by the hiring carrier (subject to the limitations contained in Section 220.21) and must make a timely application in accordance with normal carrier procedures for any particular job vacancy.

(b) A designated employee hired by any covered air carrier pursuant to the provisions of the Act shall not be required, as a condition of employment, or in any other manner, to relinquish, waive, or forfeit any seniority or recall rights which such person may possess with any other air carrier; *Provided, however,* That the provisions of this part shall not be deemed to create or prolong any such seniority or recall rights.

Subpart C—Carriers' Responsibilities

§ 220.20 Duty to hire.

(a) Subject to § 220.24, a covered air carrier shall have the duty to hire a designated employee, regardless of age, who otherwise meets the qualification requirements established by such carrier before it hires any other applicant when such carrier is seeking to fill a vacancy in the designated employee's occupational specialty from outside its work force. As used herein "work force" shall include all present employees and any furloughed or terminated employees who, at the time of furlough or termination, possessed recall or seniority rights.

(b) Subject to the provisions of § 220.24, a covered air carrier shall not fill a vacancy, which would otherwise be available to a designated employee, by promoting or reassigning a seasonal or temporary employee, *unless* such seasonal or temporary employee is a designated employee.

(c) When considering applications from more than one designated employee for a particular vacancy, a covered

air carrier shall be entitled to offer employment to any such designated employee in its absolute discretion.

§ 220.21 Criteria for Employment.

(a) A covered air carrier shall be entitled to apply any prerequisites or qualifications determined by it for any vacancy, except that, solely with respect to the duty to hire created by the Act, a covered air carrier shall not be entitled to limit employment opportunities for designated employees on the basis of:

(1) Initial hiring age (provided that such prohibition shall not be applicable to retirement ages applicable to all of any class or craft of such air carrier's employees); or

(2) The existence of any seniority, recall rights or previous experience with any other air carrier; *Provided, however,* That covered air carriers shall be entitled to require prospective employees to disclose the existence of any such seniority or recall rights in making application for employment and to take the existence or nonexistence of such rights into account in selecting from among those qualified designated employees who have applied for a particular job vacancy.

(b) In filling job vacancies during the effective period, covered air carriers shall be entitled to require applicants to furnish evidence that they are designated employees.

§ 220.22 Listing a vacancy.

(a) During the effective period all air carriers shall be required to list each vacancy with the Center at the earliest practicable time, and to include with such listing a statement as to whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy. In addition, any air carrier shall be entitled to list anticipated vacancies with the Center at any time.

§ 220.23 Content of vacancy listing.

Air carriers shall provide the Center with a description for each job listing, which shall include, but need not be limited to, the following—

(a) Job title;

(b) Type of position (full or part-time);

(c) Salary;

(d) Basic qualifications and/or training requirements;

(e) Brief description of duties;

(f) Location of vacancy (if known);

(g) Special requirements such as type rating, licensing, skill requirements, etc.;

(h) Whether the vacancy is subject to the duty to hire;

(i) Information on how to apply, such as contact person, mailing address, and any special application procedures; and

(j) Whether the carrier is subject to an equal employment opportunity requirement, as defined in these regulations, in filling the vacancy.

§ 220.24 Filling a vacancy.

(a) A covered air carrier may fill a vacancy with a designated employee at any time after a vacancy has been listed with the Center.

(b) A covered air carrier may fill a vacancy with someone who is not a designated employee after the vacancy has been listed with the Center for at least 30 calendar days; if

(1) No designated employee with the requisite occupational specialty has applied for the vacancy in accordance with § 220.30 within that time;

(2) No designated employee who did apply within that time period meets the carriers' criteria for employment as set forth in § 220.21; or

(3) The vacancy is subject to an equal employment opportunity requirement and the carrier cannot satisfy such equal employment opportunity requirement by hiring a designated employee.

(c) A covered air carrier may fill a vacancy on a temporary basis with someone who is not a designated employee while the carrier is considering applications for the vacancy which were received from designated employees during the listing period.

(d) The date of the listing shall be the date on which the listing is received by the Center.

§ 220.25 List of protected employees.

(a) Within 60 calendar days of the effective date of these regulations, each covered air carrier shall provide the Secretary with a list of all protected employees who were employed by it on October 24, 1978.

(b) The list shall contain the following information:

(1) Protected employee's name;

(2) Social Security number (if available); and

(3) Current occupational specialty for present employees or occupational specialty at the time of separation from employment for former employees.

(c) Not later than 90 calendar days after the effective date of these regulations, each covered air carrier shall provide a onetime notice to each employee with an employment relationship with the carrier on October 24, 1978, stating whether or not the carrier has determined that employee to be a protected employee within the meaning of these regulations, and if so that the carrier has reported his or her name to the Secretary. Employ-

ees who are determined to be not protected shall be advised of their rights to appeal.

(2) Employees who dispute the carrier's determination of protected status may submit evidence of their status to the covered air carrier within 60 calendar days of receiving the notice required by paragraph (c)(1).

(3) The covered air carrier shall consider the evidence submitted by the employee and shall inform the employee of its final determination within 15 calendar days of the submission of evidence. In the event the carrier determines that the employee qualifies as a protected employee, it shall forward the information required by paragraph (b) of this section to the Secretary.

§ 220.26 Appeals to the Secretary.

(a) If the employee disagrees with the carrier's final determination under § 220.25 that he or she is not a protected employee within the meaning of this part, the employee (or his or her designated representative with express authorization) may appeal such determination to the Secretary within 60 calendar days of the carrier's final decision under § 220.25(c)(3) or the date when such decision was required.

(b) An appeal must be written, dated, and signed by the employee. It must set forth:

(1) The full name, address, and telephone number of the employee;

(2) The full name and address of the carrier making the determination; the full name of the individual(s) who made the determination for the carrier and the date of that determination;

(3) A summary of the pertinent events and circumstances concerning the employee's status and the basis of the disagreement, including the original date of hire,

date of all periods of furlough, leave or termination, and copies of relevant documents; and

(4) Such other information as may be required by the Labor-Management Services Administration (LMSA).

(c) Any appeal hereunder may be filed with any office of the LMSA (LMSA Area offices are listed as an appendix to these regulations). Upon receipt, an appeal will be forwarded to an LMSA Regional Office where the Regional Administrator will make a preliminary review of the appeal, and if warranted, request information from the parties or conduct such other investigation as may be required. If the matter cannot be resolved informally, the Regional Administrator will forward the file to the Secretary for review.

(d) If upon review of an appeal hereunder the Secretary determines that further action is not appropriate, he will so advise the parties. If upon review of the entire record the Secretary determines that the employee qualifies for protected status, the Secretary will take appropriate steps to add the employee's name to the list of protected employees and will so notify the parties.

§ 220.27 Notice of Rights.

(a) Not later than the date of separation from employment, a covered air carrier which furloughs or terminates a protected employee during the eligibility period, unless such furlough is limited to a specific period of less than 90 calendar days, shall furnish such protected employee with a notice of rights in the form of a letter or other written documentation that such employee is a designated employee and thereby is entitled to exercise a first-right-of-hire. Such notice of rights shall include, but not be limited to the following information:

(1) Name;

(2) Social Security number (if available);

(3) Occupational specialty;

(4) Date of furlough or termination;

(5) An official of the covered air carrier who can verify the individual's status as a designated employee; and

(6) Signature, name, and location of the certifying official.

(b) As soon as practicable, but not later than 60 calendar days following the effective date of these regulations, each covered air carrier shall make a reasonable effort to provide the notice of rights required in paragraph (a) of this section to any designated employee who was furloughed or terminated by such carrier on or after October 24, 1978, and prior to the effective date of these regulations and who has not been recalled to employment by such covered air carrier.

(c) A covered air carrier shall provide a verified true copy of the notice of rights to a designated employee who has lost his or her original copy.

§ 220.28 Air carrier actions to be reported to the Secretary.

(a) A covered air carrier shall report to the Secretary:

(1) The names and Social Security numbers (if available) of all designated employees hired by it, and

(2) The filling of any vacancy with other than a designated employee. With respect to any occurrences reported under paragraph (a)(2) of this section, the report of the covered air carrier shall contain the job order number assigned to that vacancy by the Center, the date of hire, and a certification by a corporate officer that the carrier complied with the provisions of this part and that no qualified designated employee with the requisite occupational specialty applied in a timely manner.

(b) Two copies of the reports required by this section shall be filed with the Secretary covering the six-month periods ending June 30 and December 31 of each calendar year in which these regulations are in effect and shall be submitted within 60 calendar days of the end of the reporting period.

§ 220.29 Equal Employment Opportunity.

(a) Where a covered air carrier is under an equal employment opportunity requirement, the covered air carrier shall, to the extent possible, satisfy this equal employment obligation by hiring qualified designated employees.

(b) Where a covered air carrier is under an equal employment opportunity requirement and cannot satisfy such requirement by hiring from the pool of qualified designated employees, the carrier may meet its equal employment requirement by hiring non-designated employees. *Provided, however,* That this provision shall not change or reduce the responsibilities of carriers in regard to the hiring procedures required by §§ 220.21, 220.22, 220.23, and 220.24.

Subpart D—Designated Employees' Responsibilities

§ 220.30 Designated employees' responsibilities.

It is the responsibility of each designated employee to:

(a) Make application to any covered air carrier for whom the designated employee desires to work in the time and manner required by such carrier.

(b) To insure that an application previously submitted to a covered air carrier which currently lists a vacancy is in an active status so as to be considered for such vacancy;

(c) To provide a copy, if requested, of the notice of rights to a potential employing air carrier, and

(d) To retain the original notice of rights for future use.

Subpart E—Department of Labor's Responsibilities

§ 220.40 Comprehensive job list.

(a) The Secretary shall establish a Center to maintain a comprehensive listing of all vacancies listed by air carriers in accordance with §§ 220.22 and 220.23.

(b) The Center will be accessible by telephone throughout the United States to facilitate the listing or modifying of vacancy information by air carriers.

(c) The Center shall provide an air carrier with an identifying number for each vacancy listed on the comprehensive listing.

(d) The comprehensive listing shall be compiled, published and distributed to each local office of the State Employment Security Agencies on a periodic basis as determined necessary by the Secretary, and it shall be distributed to such other individuals or organizations as may desire to receive copies thereof in accordance with criteria established by the Secretary from time to time.

§ 220.41 List of protected employees.

The Secretary shall establish and publish a list of protected employees as reported by covered air carriers under § 220.25. A copy of this list shall be sent to all covered air carriers as soon as available.

Subpart F—Administration

§ 220.50 Effective period of the program.

(a) *Beginning date.* (1) The requirements set forth in this part shall be effective 60 legislative days from publication of these regulations (A legislative day is defined by the Act as a calendar day when both Houses of Congress are in session).

(2) The Department shall publish a notice in the Federal Register announcing the actual effective date.

(b) *Ending date.* This program and these regulations terminate on the last day of the effective period.

(c) Nothing in this Part shall affect the rights and duties of protected employees and covered air carriers under the Act prior to the effective date of this Part.

§ 220.51 Disclosure of information.

The Department of Labor shall make available to covered air carriers and to designated employees or their authorized representatives, all reports, certifications, or lists collected under this Part, to the extent permitted by the Privacy Act (5 U.S.C. 552a) and the Department's regulations issued pursuant to that Act (29 CFR Part 70a).

Appendix I—U.S. Carriers Certificated as of October 23, 1978, Under Section 401 of the Federal Aviation Act of 1958, as Amended

(Annotations Reflect Operating Status as of October 25, 1983).

1. Airlift International, Inc.
2. Air Micronesia, Inc.
3. Air Midwest
4. Air New England, Inc. (*1*)
5. Air Wisconsin, Inc.
6. Alaska Airlines, Inc.
7. Allegheny Airlines, Inc. (*2*)
8. Aloha Airlines, Inc.
9. American Airlines, Inc.

10. Aspen Airways, Inc.
11. Braniff Airways, Inc. (*1*)
12. Capitol International Airways, Inc. (*3*)
13. Chicago Helicopter Airways, Inc.*
14. Colonial Airlines, Inc. (*1*)
15. Continental Air Lines, Inc.
16. Delta Air Lines, Inc.
17. Eastern Airlines, Inc.
18. Evergreen International Airlines, Inc.
19. The Flying Tiger Line, Inc.
20. Frontier Airlines, Inc.
21. Hawaiian Airlines, Inc.
22. Hughes Air Corp.* (*4*)
23. Kodiak Western Alaska Airlines, Inc.
24. Mackey International Airlines, Inc.*
25. McCulloch International Airlines, Inc.
26. Midway Airlines, Inc.
27. Midway (Southwest) Airways Co.
28. Modern Airways, Inc. (*1*)
29. Munz Northern Airlines, Inc.
30. National Airlines, Inc.* (*5*)
31. New York Airways, Inc.*
32. North Central Airlines, Inc.* (*4*)
33. Northwest Airlines, Inc.
34. Overseas National Airways, Inc. (*6*)
35. Ozark Air Lines, Inc.

36. Pan American World Airways, Inc.
37. Piedmont Aviation, Inc.
38. Reeve Aleutian Airways, Inc.
39. Rich International Airlines, Inc.
40. Seaboard World Airways, Inc.* (7)
41. Southern Air Transport, Inc.
42. Southern Airways, Inc.* (4)
43. Texas International Airlines, Inc.
44. Trans International Airlines, Inc. (8)
45. Trans World Airlines, Inc.
46. United Airlines, Inc.
47. Western Air Lines, Inc.
48. Wien Air Alaska, Inc.
49. World Airways, Inc.
50. Wright Air Lines, Inc.
51. Zantop International Airlines, Inc.

* No longer holds certificate.

(1) Holds certificate, but not operating.

(2) Renamed U.S. Air, Inc.

(3) Renamed Capitol Air, Inc.

(4) Merged in to Republic Airlines, Inc.

(5) Merged into Pan American World Airways, Inc.

(6) Ceased operations in September 1978.

(7) Merged into Flying Tiger Line, Inc.

(8) Renamed Transamerica Airlines, Inc.

Note.—This appendix will appear in the Code of Federal Regulations.

APPENDIX D

The following is a list of parent companies, subsidiaries (except wholly owned) and affiliates of petitioners, pursuant to Supreme Court Rule 28.1:

Alaska Air Group, Inc.

AMR Corporation

Capitol Air Sales, Inc.

Air Reservations, Inc.

Tiger International, Inc.

Skyvoyager Air, Inc.

Tiger Trading Co.

Flying Tiger Air Services, Inc.

SWAP, Inc.

Montana Enterprises, Inc.

Tomisato Shoji Kabuskiki Kaisha

Affiliated Enterprises, Inc.

Norfolk Southern Corporation

Air Services, Inc.

Aviation Supply Corporation

NWA, Inc.

Northwest Aircraft, Inc.

Gatwick Handling, Ltd.

Compas 315, Ltd.

Ozark Holdings, Inc.

UAL, Inc.

Hertz Corp.

Mauna Kea Properties, Inc.

Westin Hotel Company

GAB Business Services, Inc.

UAL Capital Corporation

146 Haynes Corporation

Olohana Corporation

Mileage Plus, Inc.

E & T Trading Corporation

United Airlines Capital Corporation

United Airlines Credit Corporation

United Airlines Aircrew Training, Inc.

United Airlines B.V.

United Airlines S.A. de C.V.

United Vacations, Inc.

UAL Leasing, Inc.

Contingency Corp.

Dempster Properties

J & N Trading Corporation

The Linneman Corporation

United Airlines Space Technologies

USAir Group, Inc.

Henson Aviation, Inc.

JJF Investments, Inc.

WAL Communication, Inc.